

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of Section 309(j))
of the Communications Act -)
Competitive Bidding)

PP Docket No. 93-253

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

BET Holdings, Inc. ("BHI"), by its attorneys, hereby submits its reply to Oppositions to Petitions for Reconsideration of the Order on Reconsideration, adopted August 15, 1994 in the Competitive Bidding Rulemaking proceeding.^{1/} Specifically, BHI opposes the wholesale exemption of entities owned and controlled by Indian Tribes or Alaska Regional or Village Corporations from operation of the affiliation rules that presently apply to other minority and women-owned companies in determining compliance with the \$125 million revenue and \$500 million total asset financial caps for bidding on entrepreneur block spectrum.

I. INTRODUCTION

In adopting competitive bidding rules for the assignment of Personal Communications Services ("PCS") licenses, the Federal Communications Commission (the "Commission") was charged with ensuring that businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum

^{1/} See Order on Reconsideration, Competitive Bidding, PP Docket No. 93-253, FCC 94-217 (adopted and released August 15, 1994).

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based services.^{2/} As such, the Commission promulgated competitive bidding rules that provide important incentives for successful designated entity participation, including the availability of bidding credits, installment payment plans and tax certificates for eligible entities.^{3/} BHI continues to support incentives that facilitate the involvement of all minorities. BHI opposes, however, arbitrary distinctions made by the Commission among various minority groups such that entities owned and controlled by Indian Tribes or Alaska Regional or Village Corporations are not subject to the Commission's affiliation rules. Such distinctions are not supported by the record, are inconsistent with the provisions of the Budget Act and remain unsupported by Federal policies.^{4/}

II. ARBITRARY DISTINCTIONS MADE BETWEEN MINORITY AND WOMEN-OWNED ENTITIES ARE IMPERMISSIBLE AND DETRIMENTAL TO THE PUBLIC INTEREST.

Congress did not anticipate that any single minority group would be afforded more favorable treatment than other minority groups facing similar barriers to entry into the

^{2/} 47 U.S.C. § 309(j)(4)(D).

^{3/} See Fifth Report and Order, Competitive Bidding, PP Docket No. 93-253, FCC 94-178 (adopted June 29, 1994, released July 15, 1994).

^{4/} Specifically, BHI opposes the position taken by Cook Inlet, Inc. in its Opposition to Petition For Reconsideration, filed October 14, 1994 in the above referenced docket, regarding the application of the affiliation rules to women and minorities in determining compliance with the entrepreneur block financial caps.

telecommunications marketplace.^{5/} By adopting a wholesale exemption from the affiliation rules for entities owned and controlled by Indian Tribes or Native or Village Corporations, however, the Commission effectively excludes from the bidding process competing minority and women-owned firms that do not command vast resources comparable to those controlled by these corporate entities. The limits on entrepreneur block eligibility prevent large companies from dominating the bidding process for broadband PCS such that designated entities would be shut out of the PCS market.^{6/} Nevertheless, the affiliation rule exemption permits companies that have access to significantly greater capital and other financial resources to bid against smaller minority companies.^{7/}

BHI supports the availability of designated entity preferences to Native American and Alaskan PCS applicants on

5/ See BET Holdings, Inc.'s Petition for Reconsideration, Competition Bidding (filed September 21, 1994). Congress directed the Commission "to ensure that businesses owned by members of minority groups and women are not in any way excluded from the competitive bidding process" (emphasis added). See H.R. Rep. No. 103-11 at 255.

6/ See Fifth Report and Order at ¶ 121 ("small entities stand little chance of acquiring licenses in these broadband auctions if required to bid against existing large companies, particularly large telephone, cellular and cable television companies").

7/ Although Cook Inlet stresses the restrictions placed on the assets of Alaska Regional Corporations, it cannot deny the fact that the access to capital these corporations enjoy is significantly greater than the resources that will be available to other minority-owned entities participating in the bidding for entrepreneurs' block licenses.

an individual and cooperative basis. Encouraging the participation of such individuals and unaffiliated companies is consistent with the Budget Act and the treatment of all other minority groups. However, if the PCS applicant is affiliated with a "wealthy" Native Corporation or Indian Tribe, it should not benefit from targeted minority and women-owned entity preferences.^{8/}

Cook Inlet attempts to convince the Commission that the affiliation exemption places them on a level playing field with other small companies.^{9/} BHI, however, does not oppose the exemption to the extent it determines whether the Indian or Alaskan entity is a "small business" or, for that matter, whether it may take advantage of the small business consortia rules. It does, however, oppose the application of an affiliation exemption in determining whether an entity defined as a minority or women-owned entity, pursuant to Commission rules, is eligible to bid in the entrepreneurs' blocks. Adoption of the exemption will hinder the

8/ The affiliation rules are applied when there is a level of shared control of an entity or the power to control an entity resides in another party or company. See Fifth Report and Order at ¶ 204. Simply because an individual (or group of individuals) is a shareholder in a Native Corporation does not mean that the PCS applicant will be ineligible to bid in the entrepreneurs' blocks. BHI only opposes the participation of PCS applicants that are controlled by corporations that have significant resources available, above the relevant financial caps, not accessible to competing entities owned by women or minorities.

9/ See Cook Inlet, Inc. Opposition to Petition for Reconsideration at 4-6, 11-13.

participation of competing designated entities that face substantial disadvantages in the PCS auction process. Moreover, providing this exemption will encourage designated entity "fronts" as larger companies partner with specific designated entities without fear of disqualification from bidding through affiliation.

The Federal law and policies referenced by Cook Inlet in its Opposition only apply to determinations regarding whether an entity is a "small business."^{10/} They do not require that the Commission provide for an affiliation rule exemption when determining whether a PCS applicant meets the entrepreneurs' block financial caps to bid as a "minority or women-owned entity." A uniform application of the affiliation rules in determining compliance with the entrepreneurs' blocks' financial caps (if applied at all) is consistent with all Federal policies and the Congressional mandates of the Budget Act.

III. THE AFFILIATION RULES AND THE AFFILIATION EXEMPTION, AS APPLIED TO MINORITY AND WOMEN-OWNED ENTITIES, WERE PROMULGATED IN CONTRAVENTION OF THE ADMINISTRATIVE PROCEDURE ACT.

The affiliation rules as applied to eligibility determinations to bid in the entrepreneurs' blocks were not promulgated in accordance with the notice and comment requirements of the Administrative procedure Act ("APA"). The Notice of Proposed Rulemaking referenced the SBA's

^{10/} See Cook Inlet, Inc. Opposition to Petition for Reconsideration at 4-5, 11-12.

affiliation rules as they apply to the definitional inquiry of a "small business."^{11/} The public was not apprised that the affiliation rules would be applied to the entrepreneur block eligibility thresholds to determine whether a woman or a member of a minority group would be eligible to bid on C & F block licenses. Accordingly, the affiliation rules were not a logical outgrowth of the proposed rules.

Moreover, any reference to the Second Report and Order as a basis for adoption of the affiliation rules as applied to minorities and women is misguided.^{12/} The Second Report and Order only discussed the SBA's affiliation rules as they related to the small business definition. Further, the affiliation rules were only applied to minority and women-owned entities, for the first time, in the Fifth Report and Order which adopted specific competitive bidding rules for Broadband PCS.^{13/} No opportunity for public comment was

^{11/} See Notice of Proposed Rulemaking, 8 FCC Rcd 7635, 7647 at n. 51 (1993).

^{12/} See e.g. Cook Inlet, Inc. Opposition to Petition for Reconsideration at 15-17.

^{13/} Cook Inlet suggests that BHI did not oppose the adoption of the affiliation rules on reconsideration of the Second Report and Order, 9 FCC Rcd 2348 (1994). Significantly, the Commission did not attempt to apply the affiliation rules to minority and women-owned entities in the Second Report and Order. At that time, the affiliation rules were only to be applied in the context of determining whether an entity was a "small business." Once the Commission applied the affiliation exemption to minority and women-owned entities, however, in the Fifth Report and Order, BHI responded immediately. See BET Holdings, Inc. Petition for Reconsideration, Competitive Bidding, PP Docket No. 93-253 at 12-20 (filed August 22, 1994).

afforded before the Commission "borrowed" the SBA's affiliation rules for defining "minority and women-owned entities" eligible for designated entity preferences.

Adoption of the affiliation rule exemption only compounds the Commission's APA violation. On August 15, 1994, the Commission, sua sponte, modified the broadband PCS competitive bidding rules to provide for a wholesale exemption from the affiliation rules without offering interested parties an opportunity to express their views. Thus, the Commission extended its violation to encompass an exemption from rules that already had been promulgated in violation of the APA.

Finally, it appears that the Commission has not complied with other Federal provisions and policies in increasing the threshold for "small businesses" from \$6 million to \$40 million.^{14/} Although Cook Inlet claims that the Commission's actions satisfy its duty to follow Federal policies, it fails to acknowledge that the Commission has

^{14/} Pursuant to Section 632(a) of the Small Business Opportunity and Credit Enhancement Act, the SBA's size standards are to be applied for purposes of all legislation and cannot be modified unless specific procedural requirements are met. Specifically, the SBA's size standards for defining "small businesses" can be modified only after the proposed size standard (1) is proposed after an opportunity for public notice and comment; and (2) is approved by the Administrator of the Small Business Administration. See Small Business Opportunity and Credit Enhancement Act, 15 U.S.C. § 632(a)(2)(1992) (amending Section 3(a) of the Small Business Act).

failed to comply with important provisions of the Small Business Opportunity and Credit Enhancement Act.

Although the Commission proposed adoption of the SBA's small business threshold of net worth not in excess of \$6 million in its initial Notice of Proposed Rulemaking, the Commission did not submit, specifically, the \$40 gross revenue standard for notice and comment.^{15/} Moreover, the record in this proceeding fails to indicate that official approval of the Administrator was received pursuant to the provisions of the revised Small Business Act. Accordingly, BHI urges the Commission to revisit the adoption of its small business definition on reconsideration and take all necessary steps to comply with statutory requirements for modification of the SBA's definition.^{16/}

IV. CONCLUSION

The Commission must modify its rules to limit application of the affiliation exemption to defining "small businesses." The exemption, as applied to the definition of minority and women-owned entities, will permit affiliates of wealthy Alaska Regional Corporations and Indian Tribes to bid in the entrepreneurs' blocks, contrary to statutory

^{15/} See Notice of Proposed Rulemaking at 7647.

^{16/} The impact of Section 632(a) must likewise be considered in light of the Commission's recent decision on reconsideration of the Second Report and Order (generic auction rules) to define "small businesses" on a service-specific basis. See Second Memorandum and Order, PP Docket No. 93-253, FCC 94-215 (adopted August 12, 1994, released August 15, 1994) at ¶¶ 144-45.

authority and the record in this proceeding. No Federal policy requires the adoption of the affiliation exemption, apart from its use in determining compliance with a "small business" definition.


Moreover, application of the affiliation rules to minority and women-owned entities, irrespective of the small business definition, is violative of the notice and comment provisions of the APA. Neither the affiliation rules or the affiliation exemption were properly placed on public notice pursuant to the informal rulemaking provisions of the APA. Accordingly, the Commission must vacate the affiliation rules as they apply to contexts other than a "small business" definitional determination.

Finally, the Commission must reconsider its small business definition on reconsideration and take all

necessary steps to comply with statutory requirements of the
Small Business Opportunity and Credit Enhancement Act.

Respectfully submitted,

BET HOLDINGS, INC.

A handwritten signature in dark ink, appearing to read "Debra L. Lee" followed by a stylized flourish or initials.

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